IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13/07/2004

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THE HONOURABLE MR.JUSTICE D.MURUGESAN

W.P.No.16034 of 2004
and W.P.Nos., 16068, 16095, 16444 to 16447, 16659 to 16662, 17383 of 2004
and
W.P.M.P.Nos.19009, 19041, 19061, 19430, 19432, 19434, 19436, 19707, 19709, 19711, 19713 and 20644 of 2004

Consortium of Professional Arts and
Science Colleges in Tamil Nadu
represented by its Secretary
No.29, Old No.12,
Ganapathy Street, Royapettah, Petitioner in
Chennai-14 .. W.P.No.16034 of 2004

Forum of Tamil Nadu Minority Self-
Financing Engineering Colleges
represented by its President
Mr.R.S. Munirathinam,
No.29, Old No.12, Ganapathy Street Petitioner in
Royapettah, Chennai-14 .. W.P.No.16068 of 2004

Tamil Nadu College of Engineering
represented by its Secretary and
Correspondent, Dr.P.V. Ravi
Karumathapatti, Avinashi Road, Petitioner in
Coimbatore .. W.P.No.16095 of 2004

Mohammed Sathak Trust represented by
its Chairman Dr.S.M.Hamid Abdul Quader
144/1, Nungambakkam High Road Petitioner in
Chennai-34 .. W.P.No.16444 of 2004

The Gulf Returnees Educational Society
represented by its General Secretary
Dr. G. George, H.22, East Court Petitioner in
Anna Nagar East, Chennai-102 .. W.P.No.16445 of 2004

Erode Sengunthar Engineering College
represented by its Correspondent

J.Sudhanandhen, Thudupathi Petitioner in
Perundurai Taluk, Erode District .. W.P.No.16446 of 2004
M.P.Nachimuthu M.Jagannathan Engineering
College represented by its Correspondent

J. Sudhanandhen, Chennimalai Petitioner in
Perundurai Taluk, Erode District .. W.P.No.16447 of 2004

Deen Dayal Education and Health Trust
represented by its Chairman D.T.D.Naidu
61, Deen Dayal Nagar
Kunnavalam Post,
Chennai to Tirupathy N.H Petitioner in
Tiruvallur Taluk and District .. W.P.No.16659 of 2004

Arulmigu Kalasalingam College
of Engineering represented by
its Chairman, T. Kalasalingam
14, Sriman Srinivasan Road Petitioner in
Alwarpet, Chennai-18 .. W.P.No.16660 of 2004

SKR Engineering College represented
by its Chairman A.M. Srinivasan
Nazarethpet, Poonamallee Petitioner in
Chennai-103 .. W.P.No.16661 of 2004

Anand Institute of Higher Technology
represented by its Chairman
T.Kalasalingam
Kalasalingam Nagar,
Old Mahabalipuram Road
Kazhipattur Tiruporur Taluk, Petitioner in
Kancheepuram District .. W.P.No.16662 of 2004

All India Medical and Engineering
Colleges Association (Reg.No.128/2004)
represented by its President
Dr.T.D. Naidu,
5110, H Block, I Street
12th Main Road, Anna Nagar Petitioner in
Chennai-40 .. W.P.No.17383 of 2004

-Vs-

1. Permanent Committee for the conduct
of Common Entrance Test
represented by its Member-Secretary
Higher Education Department

Secretariat, Chennai-9

2. The Government of Tamil Nadu
represented by its Secretary
Higher Education Department
Chennai-9

3. Anna University Respondents 1 to 3
represented by its Registrar in all the writ
Chennai-25 .. petitions

4. All India Council for Technical
Education represented by its Director
Southern Regional Office
Sastri Bhavan, No.26, Haddows Road 4th respondent in
Chennai-6 .. W.P.No.16095 of 2004

Writ Petitions filed under Article 226 of The Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, as stated therein.

!For petitioner in Mr. R. Krishnamoorthy
W.P.No.16034/2004 .. Senior Counsel for
Mr.V.Ayyathurai

For petitioner in Dr. Rajeev Dhavan
W.P.No.16068/2004 .. Senior Counsel for
Mr.R.S.Jeevarathinam

For petitioner in Mrs. Nalini Chidambaram
W.P.No.16095/2004 .. for Mr.L.S.Hasan Fizal

For petitioners in Mr.K.Doraiswami
W.P.Nos.16444 to Senior Counsel for
16447/2004 .. M/s Muthumani Doraiswami

For petitioners in
W.P.Nos.16659 to
16662 & 17383/2004 .. Mr. K.Selvaraj

^For respondents 1 to 3 Mr.N.R. Chandran
in all W.Ps. .. Advocate General
assisted by
Mr.V.R.Rajasekaran
Spl. Government Pleader

For 4th respondent in
W.P.No.16095/2004 .. Mr.Vijay Narayan

:COMMON ORDER

The petitioners in all these writ petitions have challenged the proceedings in SFPC/PC/00014 dated 1.6.2004 of the Permanent Committee constituted to ensure the fair conduct of Common Entrance Test for admission of students by Association/Consortium of various unaided professional engineering and Arts and Science colleges.

2. As the challenge made to the impugned order is almost on the similar grounds and common issues are involved in all these writ petitions, they are taken up together for hearing and disposal. This order shall govern all the writ petitions.

3. The petitioner in W.P.No.16034 of 2004 is Consortium of Professional Arts and Science Colleges in Tamil Nadu and formed by the following associations viz.,
(1) Association of Self Financing Private Engineering Colleges of Tamil Nadu;

(2) Tamil Nadu Self Financing Engineering Colleges Association;

(3) Tamil Nadu Unaided Colleges Management Association (TUCMA);

(4) Association of Self Financing Arts, Science and Management Colleges of Tamil Nadu;

(5) Association of Muslim Colleges of Tamil Nadu;

(6) Association of Minority Unaided Christian Institutions (AMUCI);

(7) Forum of Tamil Nadu Minority Self Financing Engineering Colleges.

4. The Consortium was formed for the purpose of conducting Common Entrance Test for admission to B.E., B.Tech., M.E., M.Tech., M.B.A., and M.C.A. Courses in respect of the seats allocated to be filled by the Managements, who are the member of colleges of the petitioner forum. The Consortium represents both self-financing minority and nonminority educational institutions established in the State of Tamil Nadu.

5. W.P.No.16068 of 2004 is filed by the 7th member of the Consortium i.e., Forum of Tamil Nadu Minority Self-Financing Engineering Colleges, as the members of the petitioner forum constitute the minority unaided private engineering colleges.

6. The petitioner in W.P.No.16095 of 2004 is the Tamil Nadu College of Engineering, a private unaided engineering college. The petitioner college

is also a member of the Consortium.

7. The petitioners in W.P.Nos.16444 to 16447 and 16659 to 16662 of 2004 are individual unaided private engineering colleges. Though the petitioners in W.P.Nos.16559 to 16662 of 2004 are not the members of Consortium, Mr.K.Selvaraj, learned counsel appearing for those petitioners would submit that the petitioners undertake to become members of Consortium and the order in the writ petitions shall govern the petitioner colleges also.

8. The petitioner in W.P.No.17383 of 2004 is the All India Medical and Engineering Colleges Association and have also questioned the same order.

9. In order to appreciate the submissions of the counsel for the petitioners and the respondents, certain facts leading to the present dispute require a mention. In the judgment reported in "UNNI KRISHNAN J.P. v. STATE OF A.P.(1993 (1) SCC 645)", the Apex Court in order to curb the commercialization of education, framed a scheme relating to admission and fixing of fee in private unaided educational institutions both for unaided minority and non-minority private educational institutions. As we are concerned with only the admission of students by unaided private educational institutions, the scheme as to the percentage of seats for the State to be filled under Single Widow System and the percentage of seats to be filled by the private unaided educational institutions under the management quota is alone referable. Under the Scheme, the Apex Court fixed 50% of seats to be filled by the State under Single Window System and the remaining 50% of the seats to be filled by the management and those seats are known as " Management Quota" with further entitlement to charge higher fee.

10. The judgment in Unni Krishnan's case came up for consideration before a Constitutional Bench of the Apex Court consisting of 11 Judges in "T.M.A.PAI FOUNDATION AND OTHERS v. STATE OF KARNATAKA AND OTHERS (2002 (8) SCC 481)." The Apex Court found that the scheme in Unni Krishnan's case has the effect of nationalizing education in respect of the right of private unaided institution, to give admission and to fix the fee. The Apex Court also held that the decision in Unni Krishnan's case insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct and to that extent the said decision and the consequent directions given to UGC, AICTE, the Medical Council of India, the Central and State Governments etc., were held to be overruled. The judgment in T.M.A. Pai Foundation case came up for clarification before the Apex Court in "ISLAMIC ACADEMY OF EDUCATION AND ANOTHER v. STATE OF KARNATAKA AND OTHERS (2003 (6) SCC 697)". The Apex Court again formulated the following questions for its consideration.

(1) Whether the educational institutions are entitled to fix their own fee structure;

(2) Whether minority and non-minority educational institutions stand on the same footing and have the same rights;

(3) Whether private unaided professional colleges

are entitled to fill in their seats, to the
extent of 100% and if not, to what extent; and

(4) Whether private unaided professional colleges
are entitled to admit students by evolving their
own method of admission.

11. Question Nos.2, 3 and 4 are relevant for the disposal of these writ petitions. Their Lordships directed the State Governments to fix the percentage of seats to be filled under Management quota depending upon the local needs. Their Lordships also permitted the private unaided educational institutions to opt for conduct of Common Entrance Test by the Association of Colleges or to admit the students on the basis of Single Window System of admissions made from among the candidates appeared for TNPCEE or the Examination conducted by the State. The option shall be exercised before the prospectus is issued. Their Lordships further also directed the respective State Governments to appoint Permanent Committee, which will ensure the fairness and transparency of the Common Entrance Test conducted by the Association of Colleges. The Constitution of the Committee also was indicated in the judgment. Pursuant to the above directions, the Government of Tamil Nadu constituted a Permanent Committee in G.O.Ms.No.69, Higher Education (J2) Department dated 19.3.2004 under the Chairmanship of the Hon' ble Mr.Justice S.S.Subramani, a retired Judge of this Court. The Permanent Committee also consists of Dr.E.Balagurusamy, Vice Chancellor, Anna University, Dr.M.S.Palanichamy, person of repute in the field of education, Dr.V.Sankaranarayan, Engineer of Eminence as members and Thiru K.Gnanadesikan, I.A.S., Secretary to Government, Higher Education Department, Chennai as Member Secretary. The said Permanent Committee after hearing the representatives of the Consortium of Self Financing Professional, Arts and Science Colleges in Tamil Nadu and other individual institutions has passed the impugned proceedings. It is also relevant to note that pursuant to the directions of the Apex Court, the Government of Tamil Nadu allocated 50% of seats for unaided non-minority professional colleges and 70% for unaided minority professional colleges to be filled as management quota.

12. The directions of the Permanent Committee in the impugned proceedings are as follows:-
A.IN THE COURSE OF CONDUCTING THE ENTRANCE TEST

(1) Consortium of self-finance professional, Arts
and Science colleges in Tamil Nadu is permitted to conduct the entrance test for admission to under-graduate engineering courses for the entire Tamil Nadu to fill up vacancies in management on the following conditions/directions.

a)Setting up of question papers and evaluation should be given to experts approved by the Committee, which reserves its right to nominate it own experts also.

b)Number of questions and papers should be same as TNPCEE and the syllabus will be of Tamil Nadu (Plus 2).

c)Question papers should be printed in any security press approved by the Committee-wherein also the nominee of the Committee will be present and the Committee also reserves its rights to get the question papers printed in a press of its choice.

d)One person nominated by the Consortium should be made totally responsible for all activities connected with the examination, i.e. setting, printing, transporting etc., who should also see that there is no leakage or other malpractice. The Committee also reserves its right to give necessary direction in this regard and also appoint such persons of its choice to supervise the activities and the person made responsible should act according to the direction given by the person so appointed by the Committee. We make it clear that the test is conducted by the management to fill up their quota and the Committee is only to supervise their work. In such case, if for any reason the paper is leaked, the entire test will be cancelled and the management takes the risk of admitting students on the basis of test conducted already by Anna University.

e)Conduct of examination should be as per procedure of TNPCEE.

f)Question should be of objective type and the answer should be scanned for valuation only by machine. Manual work is totally prohibited.

g)Examinations should be conducted only in the various District Head Quarters in Tamil Nadu and also at Ernakulam in Kerala and at Vijayawada in Andhra Pradesh. The examinations should be conducted in Government colleges as far as possible.

h)The Consortium should co-operate with the representative (who will be appointed by the Committee) at each examination centre.
i)The answer papers when collected should be separately packed and sealed by the representatives of Consortium and Committee.

j)The question papers while it is being dispatched to various centers must also sealed and signed by both representatives of Consortium and Committee and opening the packet at examination Centre must also be done in the presence of both representatives.

k)There will be separate squad appointed by the Committee for each coordinating centre.

l)Application and examination fees should be reasonable, which may be fixed by the Consortium and approved by the Committee.

m)The examination should be completed before 15th July, 2004 with notice to the Committee and the results of the examination should be published without any delay-at any rate within ten days from the date of completion of examination.

n)All expenses for the supervisory work should be met by the Consortium and one half of the estimated costs should be deposited with the Director of the

Technical Education. The estimated cost will be informed to the Consortium on getting information about the schedule of the examination.

o)All correspondence in this regard, should be absolutely confidential.

p)Due publicity should be given intimating candidates about the necessity of writing this examination along with details about the last date for the receipt of application, the fees and the date of the examination along with time-table.

q)The demand by the Consortium that it should be allowed to conduct the test on two occasions, cannot be accepted for reason already stated.

r)The Committee reserves the right to give further directions and it is made clear that the directions or conditions mentioned above are not exhaustive "Consortium" is bound to obey the same as well.

B. AFTER THE EXAMINATION AND WHILE STUDENTS ARE BEING ADMITTED.

a)All private professional engineering colleges, (Whether they are members of Consortium or not) should exercise their option to choose whether it adopts the test conducted by the Association of Colleges (i.e. Consortium) or the test conducted by the State through Anna University. The option should be exercised within seven days after the conduct of examination by the Consortium. If any College (which is a member of the Consortium) fails to exercise any option it will be deemed to have exercised its option for the State level test conducted by Anna University. Likewise if any college which fails to exercise its option (and which is not a member of Consortium) shall be deemed to have opted for the test conducted by the State through Anna University. The option exercised should be informed to the Committee in writing by Registered Post/Acknowledgment due.

b)The admission should be made only on the basis of the merit list opted and deemed to have opted and should be by counselling by following single window system as followed by Anna University under supervision of the Committee. The venue for counselling under Single Window System will be decided after the results are published and as directed by the Committee.

c)The admission of candidates shall be strictly according to Government of Tamil Nadu norms, regarding eligibility and policy of reservation also shall be followed.

d)The minority institutions also shall be bound to admit students only on merit, but they are entitled to admit their own minority students on merits as amongst them. Documents to support the claim of such students (i.e. minority students) shall be submitted at the time of counselling. The copy of such documents shall also be forwarded to the Committee along with the list of admitted students.

e)The list of students admitted, their rank number, fees collected and all particulars and details as may be required by the Committee also should be

furnished forthwith.

f)The question papers and answer sheets should be preserved in such places as directed by the Committee for a period of six months from the date of publication of results.

g)The Committee further reserves its rights to give further directions to the private colleges or Consortium which shall also be fully complied with.

13. Mr.R.Krishnamoorthy, learned Senior Counsel assisted by Mr.V. Ayyathurai, appearing for the Consortium would submit that the directions of the Permanent Committee in Clause A(1)(b)(d)(e) and (n) would deprive the valuable right of the self-financing professional and Arts and Science colleges to conduct common entrance test and admit students of their choice from among the merit listed candidates. He would draw my attention to the constitution of Committee consisting of experts to set the question papers, conduct exams under the supervision of invigilators, to value the answer scripts and to ensure the method proposed to be adopted is foolproof and fair. Hence, directions even to get the approval for number of question papers, syllabi to be followed, sending officials to supervise the conduct of test would undermine the bona fides of the Consortium. He would also submit that it is impracticable to follow the procedure being adopted by TNPCEE, as the said examination is restricted only to the candidates from Tamil Nadu whereas Consortium is entitled to conduct Common Entrance Test for the candidates from other States also. He would further submit that admission would be made strictly on the basis of merit but from among the candidates applied to each institution. Lastly he would submit that even in Single Window System of admission, there were about 2 1666 vacancies out of the total number of 42350 seats in the academic year 2003-2004. That being the factual position, insistence of Single Window System even for management seats is unwarranted.

14. Insofar as the directions in Clause B(b), the learned Senior Counsel would submit that in view of the dictum in T.M.A. Pai Foundation case, the unaided professional institutions are entitled to autonomy in the matter of administration. Autonomy in administration includes admission of the students of their choice, but of course not at the cost of merit. When the State has prescribed 50% of the seats to be filled by the Management of unaided non-minority professional institutions and 70% of the seats to be filled up by the Management of unaided minority professional institutions, the directions of the Permanent Committee for admission through Single Window System is contrary to the judgment in T.M.A. Pai Foundation case. He would also submit that as per the judgment in Islamic Academy case, there cannot be any distinction in the manner of admission by both minority and non minority professional colleges. Insofar as the directions in Clause B(c), he would submit that once the merit-based system of admission is accepted to be followed, directing the petitioner Consortium to admit students by following communal reservation is bad in law. In support of the above submission, he relied upon the judgment of a Division Bench of this Court in "KONGU ENGINEERING COLLEGE AND OTHERS v. THE STATE OF TAMIL NADU AND OTHERS (2002 (3) L.W. 151)".

15. Dr.Rajeev Dhavan, learned senior Counsel appearing for the petitioner in W.P.No.16068 of 2004 viz., Forum of Tamil Nadu Minority Self Financing Engineering Colleges would submit that the right to administer the minority institutions is a constitutional right guaranteed under Article 30 of the Constitution of India and such a right cannot be taken away by a Committee constituted only to oversee the Common Entrance Test conducted by Consortium. The Permanent Committee has exceeded and over stepped its power in directing the admissions to be made only under Single Window System, as the right to administer the educational institutions includes the right to admit students also. Following the directions in T.M.A. Pai Foundation case, 70% of the seats are allocated for the management to be filled from among the meritorious candidates on the basis of Common Entrance Test conducted by Consortium. When once certain percentage of seats are allocated, no further restriction is permissible and the directions of the Permanent Committee to follow communal reservation in the management quota and that too in the institutions established by minorities are bad. He has also advanced arguments in challenging the various directions of the Permanent Committee more or less on the same line of submissions made by Mr.R.Krishnamoorthy, learned Senior Counsel appearing for the petitioner in W.P.No.16034 of 2004. He would add that the process of admission in respect of the seats reserved for management can only be regulated by the State and there cannot be any restriction which would amount to prohibition imposed in the process of admission.

16. Insofar as the direction of the Permanent Committee as to the expenses to be borne by Consortium, he would submit that the directions in Paragaraph 20 of Islamic Academy case are very clear whereby the Apex Court had directed that the expenses incurred on the setting up of Permanent Committee, the infrastructural needs, the provision for allowance and remuneration of the Cha irman and other members of the Committee shall also be borne by the State Government. Even in case the power of the Permanent Committee to appoint persons by its choice to supervise the Common Entrance Test is upheld, the Permanent Committee could only direct the State Government to bear all the expenses for supervisory work. Hence direction in Clause (A)(1)(n) is bad.

17. Mrs. Nalini Chidambaram, learned Senior Counsel appearing for the Tamil Nadu College of Engineering, petitioner in W.P.No.16095 of 20 04, though would adopt the arguments of Mr.R.Krishnamoorthy and Dr. Rajeev Dhavan, has further submitted that the petitioner college does not have any objection for the admissions to be made to the college under Single Window System.

18. Mr.K.Selvaraj and Mr.Kandavadivel Doraiswami, the learned counsel for other petitioners adopted the arguments of Mr.R.Krishnamoorthy, learned Senior Counsel.

19. In response to the above arguments, Mr.N.R.Chandran, learned Advocate General assisted by Mr.V.R.Rajasekaran, learned Special Government Pleader would submit that the petitioners having agreed before the Permanent Committee to abide by the directions that may be issued, cannot maintain the writ petitions questioning the directions of the Permanent Committee. On this

ground alone the writ petition filed by Consortium is liable to be rejected. He would place reliance on ground No.20(C) of the affidavit filed by petitioner in support of the W. P.No.16095 of 2004 and contended that the petitioner had infact agreed that Single Window System followed by Anna University would be followed by the Consortium constituted by the Association of Colleges, as the same will be foolproof. He would submit that even in the application form made on 17.5.2004 and in the subsequent application dated 2 1.5.2004, the Consortium have submitted to the jurisdiction of the Permanent Committee by seeking permission to conduct Common Entrance Test on the conditions that may be imposed. Having sought and obtained such permission, it is not now open to the petitioners to question the jurisdiction of the Permanent Committee in imposing conditions. He would rely upon the judgment in Pannalal Binjraj case and contended that once the petitioners acquiesce themselves to the jurisdiction, they are estopped from questioning the power of the Committee to issue directions. He would draw my attention to certain paragraphs in the impugned order to sustain the plea of acquiescence and contended that the petitioners have agreed to conduct the Common Entrance Test on the same pattern of Tamil Nadu Professional Courses Entrance Examination. On merits, the learned Advocate General would submit that the power of the Committee to oversee and supervise the Common Entrance Test includes the power to appoint persons for the said purpose. The directions in Clause A(1)(b)(d)(e) and (n) are intended only to ensure a fair Common Entrance Test conducted by Consortium. He would further submit that as the judgment in T.M.A. Pai Foundation case was reconsidered in Islamic Academy case, in respect of the issues involved in these writ petitions, the law laid down by the Apex Court in Islamic Academy case alone should be taken into consideration and the petitioners are not entitled to place any reliance on T.M.A. Pai Foundation case.

20. Insofar as the direction as to Single Window System of admission, the learned Advocate General would submit that in terms of Islamic Academy case, merit is the sole criteria for admission even in respect of the seats reserved for the private unaided professional colleges and the State is obligated to ensure that meritorious students are not denied admissions. The foolproof method to ensure merit-based admission can be secured only by following the Single Window System of admission.

21. Insofar as the direction as to the rule of reservation, the learned Advocate General would submit that though the Government in G.O. Ms.No.23 (J1) Higher Education Department dated 13.2.2003 directed the unaided minority professional colleges to follow the rule of reservation of the State Government, the application of rule of reservation would not be insisted in the case of minority institutions and the said statement may be recorded.

22. Insofar as the direction of the Permanent Committee to unaided non-minority professional colleges to follow the rule of reservation of the State, he would rely upon G.O.Ms.No.22, Higher Education (JI) Department dated 13.2.2003 wherein such professional colleges were directed to follow the rule of reservation of the State. The learned Advocate General also submitted that the said order is not questioned by any of the petitioners and so long as the said order is in force, unaided non-minority professional colleges can only

admit the students strictly on the basis of merit by following the rule of reservation of the State.

23. Mr.Vijay Narayan, learned counsel appearing for the All India Council for Technical Education would submit that AICTE has issued guidelines dated 3.11.2003 in the matter of admissions. He would draw my attention particularly to paras 5, 6 and 9 of the guidelines and contended that the management quota seats in private colleges shall be filled strictly on the basis of inter se merit of the students who have taken Common Entrance Test and such admission shall be made by following Single Window System and the rule of reservation followed in the State. He would also submit that as per clause 11 of the guidelines, all institutions conducting degree level engineering programmes shall intimate to the Regional Office of AICTE and the authority in the State, the number of seats that are to be filled on the basis of tests conducted by AIEEE, State level and Association test for the following academic year. Insofar as the candidates from other States, they must take only the Common Entrance Test conducted by the AIEEE and in the absence of any communication by the Consortium as to the number of seats to be filled from among the candidates belonging to other States, the Consortium cannot admit students from other States. The conduct of Common Entrance Test by AIEEE for the students from other States is only to avoid hardship caused to such students in taking more than one CET, namely the tests conducted by Association in each State. As these guidelines are in conformity with the judgments of the Apex Court, no deviation is permissible. The option to fill up the seats by Common Entrance Test conducted by the State or Central Agency or by Consortium shall be exercised by the individual institutions before the prospectus is issued and such option shall be intimated to the AICTE in advance. The AICTE has not received so far such options.

24. From the above submissions as well the pleadings, the following points arise for consideration:-
(1)Whether the Consortium is estopped from questioning the power of the Permanent Committee in issuing directions after submitting itself to the jurisdiction of the Committee?
(2)Whether, after the judgment in Islamic Academy case, the petitioners are entitled to rely upon the judgment of the Apex Court in TMA Pai Foundation case?
(3)Whether the exercise of power by the Permanent Committee in issuing directions as contained in Clause A(1)(b)(d)(e) and (n) is in conformity with the directions of the Apex Court in Islamic Academy case and is therefore justified?
(4)Whether the direction of the Permanent Committee contained in Clause B(b) to follow the Single Window System of admission as followed by Anna University under the supervision of the Committee is justified?
(5)Whether the direction of the Permanent Committee contained in Clause B(c) to follow the policy of reservations while admissions are being made is justified?
(6)Whether the Consortium is entitled to conduct Common Entrance Test and fill up the seats from the candidates belonging to other States.

25. Point No.1: As far as the plea on acquiescence, the learned Advocate General drew my attention to certain paragraphs in the impugned order wherein the Permanent Committee has noted that the management had agreed to abide by any directions given by the Committee under their supervisory power. The relevant portion reads thus. "For the purpose of conducting tests, the management agreed that they will abide any direction given by the Committee under their supervisory power. In view of the above, we are of the view that consent could be given to the Consortium to conduct the entrance te st, which has to be done in a fair and transparent manner. For the above purpose and in exercise of our supervisory power the Committee also proposes to put forward certain conditions which the Consortium have agreed to obey." The plea of acquiescence is raised both in respect of the directions contained in Clause-A as well in Clause-B. Though a plain reading of the paragraphs reveals that the managements have agreed to abide by any direction given by the Committee, the plea of acquiescence shall not stand in the way of the managements to question the directions on the ground that they are opposed to the judgments in T.M.A. Pai Foundation and Islamic Academy cases. As the sustainability of the directions is to be dealt with on merits on the points formulated, the plea of acquiescence is unacceptable. The judgment of the Apex Court in " MESSRS. PANNALAL BINJRAJ AND OTHERS v. UNION OF INDIA AND OTHERS (AIR 1957 SC 397)" relied upon by the learned Advocate General is distinguishable on facts. That case arose under the Income Tax Act, 1922 wherein the constitutionality of Section 5(7A) was challenged. By the said section, the Commissioner of Income Tax was vested with the power of transfer of any case from one Income Tax Officer subordinate to him to another and the Central Board of Revenue to transfer any case from any one Income Tax Officer to another. When a question arose as to whether such of those petitioners who did not raise any objection for their cases being transferred from one Income Tax Officer to another and submitted themselves to the jurisdiction of the Income Tax Officers whom their cases were transferred, the Apex Court held that after submitting the jurisdiction and after they acquiesced themselves to the jurisdiction of the Income Tax Officer to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of the Apex Court under Article 32. In the case on hand, the challenge is not that the Permanent Committee has no jurisdiction to supervise the conduct of examination as directed in Islamic Academy Case, but is only in respect of the manner in which the jurisdiction has been exercised. I find that the judgment relied upon by the learned Advocate General does not in any way support the plea of acquiescence on the plea that the Permanent Committee has exceeded its power. Hence, I reject the said submission and hold that the petitioners are entitled to question the directions contained in the impugned order.

26. Point No.2: In addition to ten issues formulated on 10.4.2002 in T.M.A. Pai Foundation case, the following five more issues were also formulated on 31.10.2002.

(1) Is there a fundamental right to set up educational institutions and, if so, under which provision?

(2) Does Unni Krishnan case (1993 (4) SCC 111) required reconsideration?

(3) In case of private institutions (unaided & aided) can there be Government regulations and, if so, to what extent?

(4) In order to determine the existence of a religious or linguistic minority in relation to Article 30, what is to be the unit, the State or the country as a whole?

(5) To what extent can the rights of aided private minority institutions to administer be regulated?

These issues encompass not only the issue of fundamental right to set up educational institutions, but also as to whether the judgment in "UNNIKRISHNAN J.P. v. STATE OF A.P. (1993 (1) SCC 645)" required reconsideration and whether private institutions both aided and unaided should follow government regulations and, if so, to what extent. As the issues in these writ petitions are related only to unaided institutions, the discussion and finding in regard to unaided institutions are only referred to in this order.

27. From paragraphs 48 to 66 of the judgment in T.M.A. Pai Foundation case, Their Lordships have dealt with the issue as to the private unaided non-minority institution in the matter of admission of students, reasonable fee structure, etc. From paragraphs 67 to 70, Their Lordships have dealt with the regulations that can be framed relating to private unaided professional colleges. The law laid down in the above paragraphs was considered subsequently in Islamic Academy case, more particularly, with reference to paragraph 68 of T.M.A. Pai Foundation case. It was argued on behalf of the Union of India, various State Governments and the students that the majority judgment makes a clear distinction between professional educational institutions (both minority and non-minority) and other educational institutions i.e., schools and undergraduate colleges and that in professional institutions merit had to play an important role and that excellence in professional education required that for purposes of admission merit is determined by government agencies. It was also argued that paragraph 68 provides that in unaided professional colleges only a "certain percentage of seats" can be reserved for admission by the management and it is permissible for the University or the Government to require a private unaided professional institute to provide for a merit-based selection. The question that was raised on the basis of paragraph 68 read with paragraph 59 was as to the fact that in unaided professional colleges, merit should be determined by a common entrance test conducted by government agencies. In view of the above submissions, Their Lordships clarified paragraph 68 of T.M.A. Pai Foundation case. In the sub-heading "private unaided professional colleges", it was clarified that the judgment in T.M.A. Pai Foundation case covers both minority as well as non-minority professional colleges. As far as the submission as to the "certain percentage of seats", it was clarified that specified percentage of seats can be reserved for admission by the management and the rest should be filled on the basis of counselling by State agencies.

Their Lordships have further clarified that in non-minority professional colleges, admission of students other than percentage given to the management can only be made on the basis of merit as per the common entrance test conducted by Government agencies. In paragraph 115, Their Lordships clarified that minority professional colleges can admit in their management quota, a student of their own community/language in preference to a student of another community even though other students are more meritorious. Their Lordships further clarified that whilst selecting/admitting students of their community/language, the inter se merit of those students cannot be ignored. It was further clarified that even the admission of members of their community/language shall be strictly made on the basis of merit. It was further clarified that if the seats cannot be filled from the members of their community/language, the other students can be admitted only on the basis of merit-based common entrance test conducted by government agencies. In addition to the directions contained in T.M.A. Pai Foundation case, Their Lordships also directed that admission by the management can be by a common entrance test held by itself or by a State/University or by the Association and that each institute cannot hold separate test. The purpose for which the common entrance test is held by the Association and the manner of admission and the list of candidates selected are all indicated in paragraph 16 of the judgment. A further direction to the State Government to constitute a Permanent Committee to oversee the test to be conducted by the Association was issued in paragraph 19 of the judgment. Their Lordships have only clarified certain portions of the judgment in T.M.A. Pai Foundation case as to the right of the unaided professional colleges including minority and non-minority, reservation of certain percentage of seats for admission by the management, the conduct of common entrance test by the Association and in addition to issue of certain directions. As the judgment in Islamic Academy case is only clarificatory in nature clarifying the judgment in T.M.A. Pai Foundation case, more particularly, paragraphs 59 and 68, the submission of the learned Advocate General that after the judgment in Islamic Academy case, the petitioners are not entitled to rely upon the judgment in T.M.A. Pai Foundation case has no merit. For appreciation of the issue in question, both the judgments in T.M.A. Pai Foundation and Islamic Academy cases hold good. For the said reason, I hold that the petitioners are entitled to question the impugned proceedings of the Permanent Committee not only by placing reliance on Islamic Academy case, but also on T.M.A. Pai Foundation case.

28. Point No.3: Appointment of Permanent Committee by the State Government was made in G.O.Ms.No.69, Higher Education (J2) Department dated 19.3.2004. The Permanent Committee was appointed pursuant to the directions of the Apex Court in Islamic Academy case. To understand the scope and power of the Permanent Committee, paragraphs 19 and 20 of the said judgment are referable. The directions in regard to the appointment of Permanent Committee and its power with reference to the questions raised in these writ petitions can be culled out as follows:-

(1)The respective State Governments should appoint a Permanent Committee and such Committee shall ensure the test conducted by the Association of colleges is fair and transparent.

(2)The Committee shall have the power to oversee the tests conducted by the Association.

(3)The Committee shall have the power to call for the proposed question paper(s), to know the names of the paper setters and the examiners and to check the method adopted to ensure that the papers are not leaked.
(4)The Committee shall have the power to appoint experts to supervise and ensure that the test is conducted in a fair and transparent manner.
(5)The expenses incurred on the setting up of Permanent Committee shall be borne by the State.
(6)The expenses as to infrastructural needs and provision for allowance and remuneration of Chairman and other members of the Committee shall also be borne by the State Government.

29. The challenge to Clause A(1)(b)(d)(e) and (n) requires consideration with reference to the above powers of the Committee. In Clause A(1)(a), the Permanent Committee has directed the setting up of question papers and evaluation should be done by experts approved by the Committee and reserved the right to nominate its own examiners also. In terms of the directions, the power of the Committee shall also include the power to call for the proposed question papers, to know the names of the paper setters and the examiners and to check the method adopted to ensure that the papers are not leaked. There is no controversy on this issue.

30. Insofar as the challenge to Clause A(1)(b) and (e) of the impugned order, the Permanent Committee has directed the Consortium to set the number of questions as followed in TNPCEE, the syllabus of Tamil Nadu (+2) course and the conduct of examination as per the procedure of TNPCEE. The power of the Committee is only to oversee the test conducted by the Association. Of course, the said power also includes the power to call for the proposed question papers, names of the paper setters and examiners and to check the method adopted to ensure that the papers are not leaked. The power vested with the Permanent Committee is basically only to ensure as to whether the test conducted by the Association is in a fair and transparent manner. No where in the directions, a power is conferred on the Permanent Committee even to issue directions as to setting up the numb er of question papers, the manner in which the examination should be conducted and the syllabi to be followed. If the above is accepted, the status of the Consortium to conduct Common Entrance Test will be reduced to "only an agency of the State" to conduct the test. It is made clear that this Court is considering the power of the Permanent Committee as envisaged by the Apex Court and not the power of the State/University/AICTE to issue such direction. So long as the fairness is exhibited in the conduct of Common Entrance Test by Consortium and the direction in Clause A(1)(a) is ensured, no further interference is contemplated as to how the question papers are set etc. How the question papers should be set and as to how the examination should be conducted are matters to be left entirely to the discretion of the Association and the Consortium in this case, as they are entitled to select and admit best students in their assessment. An argument was advanced by the learned Advocate General by placing reliance on the letter of the Consortium dated 21.5.2004 while seeking permission from the Permanent Committee for conduct of entrance examination whereby it was indicated that the common entrance test shall consist of four papers viz., Maths, Biology, Physics and Chemistry. According to the learned Advocate General, Biology is not one of the subjects

required in engineering courses and the inclusion of the said subject in Common Entrance Test is unnecessary. It was fairly submitted by Mr.R.Krishnamoorthy, learned Senior Counsel appearing for the Consortium that the test will be conducted only in Maths, Physics and Chemistry and no questions will be asked in Biology. The question papers set up by TNPCEE are also only on Maths, Physics and Chemistry subjects. I find no difference in the conduct of common entrance test by the Consortium in the above three subjects only, as the said method is also followed in TNPCEE. Moreover, the directions for the conduct of examination made in paragraph 16 of Islamic Academy case, are referable.

"In our view what is necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by the State/University". The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test conducted by the State."

The above paragraph clearly indicates that the common entrance test held by the Association must be for admission to all colleges in that type. It is also held that if any professional college chooses not to admit from common entrance test conducted by the Association, then that college must necessarily admit the students from common entrance test conducted by the State. There is a clear distinction in the matter of conduct of the common entrance test by the management and the State. There is no embargo on the managements to evolve their own method in number of question papers and the conduct of examination. The directions of the Apex Court does not suggest that common entrance test conducted by the Association/Consortium shall be only on the same pattern followed by TNPCEE. In the absence of any such restriction and in the event the Permanent Committee ensures a fair and transparent manner in the conduct of examination, the directions contained in Clause A(1)(b) and (e) would be beyond the power conferred on the Permanent Committee. Such directions would amount to interference on the right of the Association/Consortium t o conduct the common entrance test. Except the restrictions on the individual colleges to hold separate test, I find no other restrictions imposed by the Apex Court as to the manner in which the examinations are to be conducted. Hence the directions in Clause A(1)(b) and (e) are liable to be set aside, as they are beyond the powers of the Permanent Committee.

31. Insofar as the directions in Clause A(1)(d), the Permanent Committee is vested with the power to supervise, setting, printing and

transporting etc., of the question papers and also to see that there is no leakage or other malpractice and for the said purpose, the Committee can also appoint such persons of its choice to supervise those activities. As a necessary corollary, the Committee has the power to direct that one member should be nominated by the Consortium and that member should be made responsible for all the activities connected with the examination and in the event of any malpractice, such member should be held responsible. The Committee has also the power to direct the cancellation of the entire test in the event the question paper is leaked. Mr.R.Krishnamoorthy and Dr.Rajeev Dhavan, learned Senior Counsel argued that in directing the person to be nominated by the Consortium to be totally responsible for all activities connected with the examination is beyond the power of the Committee. In this regard, the following directions of the Apex Court in Islamic Academy case made in paragraph 16 are referable. "The question paper and the answer papers must be preserved for such period as the concerned authority or Committee may indicate. If it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in appropriate cases recognition/affiliation may also be withdrawn. To ensure fair and transparent manner of conduct of examination and also to ensure that admission of students should be on the basis of merit, the institute attracts penalty in addition to withdrawal of recognition/affiliation in appropriate cases." Unless responsibility is fixed, the merit-based admission cannot be ensured. The only reasonable conclusion would be that the directions of the Permanent Committee in Clause A(1)(d) is to ensure fairness and transparency in the conduct of tests and well within the directions in Islamic Academy case. In that view of the matter, I find no merits in the challenge to the said clause.

32. Insofar as the challenge to Clause A(1)(n) as to the expenses incurred for the supervisory work to be met by the Consortium and onehalf of the estimated amount to be deposited with the Directorate of Technical Education, paragraph 20 of the judgment in Islamic Academy case needs a reference. In exercise of power under Article 42 of the Constitution of India, the Apex Court directed the setting up of Committee in each State. While such Committee was directed to be constituted, it was made clear that the expenses incurred for setting up of such Committee shall be borne by the State and in addition to the same, the infrastructural needs and provision for allowance and remuneration of the Chairman and other members of the Committee shall also be borne by the State. The Committee is vested with the power to oversee the test to be conducted by the Association/Consortium. The said power also includes the power to oversee the question papers, to know the names of the paper setters and examiners and to check the method adopted to ensure that the papers are not leaked. The Committee shall also have the power to supervise and ensure that the test is conducted in a fair and transparent manner. In order to ensure the above, the Committee is entitled to appoint such persons of its choice to supervise these activities. The appointment of experts is only to discharge the functions of the Permanent Committee. The Constitution of the Permanent Committee has been referred to in the earlier portion of the order. It contains persons of eminence, as the Chairman himself is a retired Judge of this Court, two members are reputed persons in education, one member is an engineer of eminence and the other member Secretary is the Secretary to Government and it may not be possible for

them to supervise the conduct of examination in all centres held simultaneously of course, on two days, the setting up of question papers and evaluation of the same. While the power of the Permanent Committee to appoint experts is upheld on the ground that the same is in conformity with the directions of the Apex Court in Islamic Academy case, the supervisory work shall also be traced to the work of the Permanent Committee in discharging its functions. The directions to the State Government to bear the expenses for setting up of the Committee including the infrastructural needs and provision for allowance and remuneration to Chairman and other members of the Committee to be borne by the State, shall therefore, necessarily mean that the State should bear the expenses of those persons appointed to supervise the process of conduct of the examination, more particularly, setting, printing, transporting and conduct of common entrance test also. For the said reason, I hold that the directions contained in Clause A(1)(n) in directing the Consortium to bear the ex penses incurred for the supervisory work and also to deposit the same with the Directorate of Technical Education cannot be sustained.

33. In regard to Clause A(1)(m), the Committee has directed the Consortium to complete the examination before 15th July, 2004 and the results of the examination shall be published without any delay at any rate within 10 days from the completion of the examination. Mr.R. Krishnamoorthy and Dr.Rajeev Dhavan, learned Senior Counsel submitted that in view of the pendency of the writ petitions, the time for conduct of the common entrance test must be extended. In fact they have submitted that the Consortium has fixed the date of examination on 24 th and 25th of July, 2004, as the writ petitions are pending in this Court and the petitioners have lost considerable time in litigation. This request is reasonable and acceptable. Accordingly, the Consortium is permitted to conduct the common entrance test as scheduled on 24 th and 25th of July, 2004 with a further direction that the results of the examination shall be published on or before 4th of August, 2004 .

34. Point Nos.4 & 5: The members of Consortium consist both minority and non-minority institutions. Hence it would be appropriate to deal with the points separately in respect of minority and nonminority institutions.

UNAIDED MINORITY INSTITUTIONS:
Article 29(1) contemplates that "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." The right of a minority community to establish and maintain educational institutions of its choice is a necessary concomitant of the right conferred by Article 29(1). This right is however subject to limitations in clause (2) of the said Article in the event such institution receives aid from the State. The above dictum is settled in In Re Kerala Education Bill (A.I.R. 1958 SC 956). Article 29(2) contemplates that "no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." The said clause cannot be pressed into service in respect of an unaided minority institution. Article 15(4) empowers the State to make special provision for advancement of any socially and educationally backward classes of citizens or

for the Scheduled Castes and the Scheduled Tribes. The said Clause is only an enabling provision and does not surpass constitutional guarantee given to a minority community to establish educational institution of its choice under Articles 29(1) and 30. The right of a minority community to establish educational institution of its choice includes the right to administer the institution. In turn the right to administer shall include the right to admit the students. The law on this issue is settled by the Apex Court in the judgment reported in "ST.XAVIER'S COLLEGE v. STATE OF GUJARAT (A.I.R. 1974 (1) SCC 717)". Article 30(1) provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Article 30(1) contemplates the right of minorities to establish and administer educational institutions of their choice. While Article 29(1) gives a linguistic minority community right to conserve its language or culture, Article 30(1) confers all religion or linguistic minorities the right to establish educational institutions of their own choice. Article 30(1) is wider than mere conservation of script, culture etc as indicated by the word "choice". In "SHAHAL H. MUSALIAR AND ANOTHER v. STATE OF KERALA AND OTHERS (1993 (4) SCC 112)", a Constitution Bench held that minority institutions are entitled to fill all the seats earmarked as management quota from among the candidates belonging to that minority community in the order of merit. However, the right of a minority to administer its educational institutions is not absolute as held by the Apex Court in "SIDHAJBHAI SABHAI v. STATE OF GUJARAT (A.I.R. 1963 SC 540) and in "FRANK ANTHONY PUBLIC SCHOOL EMPLOYEES' UNION v. UNION OF INDIA (1986 (4) SCC 707)" as it is subject to reasonable regulations and such regulations are intended for the benefit of the institution. This principle of law is also approved by the Apex Court in "ALL SAINTS SCHOOL v. GOVERNMENT OF A.P. (1980 (2) SCC 478)" and in "ST.STEPHEN'S COLLEE v. UNIVERSITY OF DELHI (AIR 1992 SC 1630)". In Sidhajbhai Sabhai case it has been held that the State has power to regulate the exercise of right of minority community to administer institution in the interest of efficiency of its institution, discipline, health, sanitation, morality or public order or the like so long as they do not constitute restrictions on the substance of the right guaranteed under Article 30(1). While the State has power to make regulation, to regulate the exercise of the right of the minority community to administer institution, it has no power to impose restrictions which would in turn amount to infringe the right guaranteed under Article 30(1) on the minority communities to establish educational institutions of their choice.

35. In T.M.A. Pai Foundation case, Their Lordships observed that right under Article 30(1) is not absolute or above other provisions of law. It is further held that there is no reason why regulations or conditions concerning generally the welfare of students should not be made applicable in order to provide a proper academic atmosphere as such provisions do not in any way interfere with the right of administration or management under Article 30(1). There is no dispute that 70% of the seats are reserved for being filled from among the candidates who have taken the Common Entrance Test conducted by consortium. There is no further dispute that in the event the unaided minority institutions could not fill up all the seats from the candidates on merit basis, such seats should be surrendered to the State to be filled from among the meritorious candidate in the Common Entrance Test conducted by Anna

University. The State is well within the power in issuing such directions as it is only regulating the admission and the State shall also ensure the admissions are only on merit basis and that too from among the candidates belonging to the minority community of the institutions. Such directions are by way of regulatory measure. Once such safeguards are made, the right to admit 70% of seats from among the candidates belonging to minority community will be within the law declared by the Apex Court. Any further direction either by the State/University/AICTE would amount only to restriction on admission of students either by following Single Windo w System or by following communal reservation, as the same would amount to restriction on the fundamental right granted on minority institution to establish, administer and admit the students of its choice. As the power of the State itself is restricted to only to issue direction to regulate the admission and not to impose limitations/restrictions to follow Single Window System, the directions of the Permanent Committee are also beyond the powers vested in it in Islamic Academy case. While referring to G.O.Ms.No.23, Higher Education (J1) Department dated 13.2.2003 relating to direction for unaided minority professional colleges to follow rule of reservation of the State Government, the learned Advocate General would also fairly submit that the application of communal reservation would not be insisted in the case of minority institutions. He would also submit that the said statement could be recorded. Hence, I hold that the minority institutions are entitled to fill 70% of the seats from among the candidates of their community but strictly on merit without reference to Single Window System of admission and communal rule of reservation and in case if any seat is not filled, the same shall be reverted back to the State. Consequently, the direction in Clause B(b)(c) in respect of minority institutions cannot be sustained.

UNAIDED NON-MINORITY INSTITUTIONS:

The issue as to the right of private unaided educational institutions running professional courses had earlier came up for consideration before the Apex Court in Unni Krishnan's case. Insofar as the private unaided institutions, the Apex Court by way of a Scheme directed at least 50% of the seats in every professional college shall be filled by the nominees of the Government or the University as the case may be, as free seats. The scheme envisaged further that those students shall be selected on the basis of merit determined on the basis of Common Entrance Examination or in the absence of an entrance examination, by such criteria as may be determined by the competent authority or appropriate authority as the case may be. The remaining 50% of seats commonly known as "payment seats" shall be filled from those candidates who are prepared to pay the fee prescribed therefor and who have complied with the instructions regarding deposit and furnishing of cash security/bank guarantee for the balance of the amount. The scheme further envisaged that the allotment of students against payment seats shall also be done on the basis of inter se merit determined on the same basis as in the case of free seats. It was further directed that there shall be no quota reserved for the management or for any family, caste or community which may have established such college. The scheme spoke of private unaided educational institution running professional college and no distinction was made between minority and nonminority institutions. The scheme in Unni Krishnan's case came up for consideration before the Apex Court in T.M.A. Pai Foundation case and insofar

as the scheme framed in Unni Krishnan's case relating to grant of admission and fixing of fee, Their Lordships held that the scheme was not correct and to that extent the decision and consequent direction given to UGC, AICTE, Medical Council of India, Central and State Governments etc., was overruled, as the allotment of 50% of seats to private unaided educational institutions running professional colleges was held as not correct.

36. All citizens shall have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(1)(g) and 26(a) of the Constitution of India. Article 19(6) enables the State to enact law imposing reasonable restrictions in the interest of general public on the right conferred under Article 19(1)(g). Article 26(a) enables every religious denominations or any section thereof to establish and maintain institutions for religious and charitable purposes, but subject to public order, morality and health. Such institutions cannot insist grant from the State as a matter of right, as the grant of aid is subject to resources of the State. Aided institutions shall abide by all laws, regulations and directives of the Government. In that context, the unaided non-minority institutions, compared to the aided institutions will have more autonomy to run the institutions. While considering the private unaided non-minority educational institutions, Their Lordships in T.M.A. Pai Foundation case observed that while the State has the right to prescribe qualification necessary for the admission, private unaided colleges have their right to admit students of their choice, subject to an objective and rational procedure of selection and compliance with the conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. It was also held that the right to establish educational institution can be regulated, but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure and the prevention of maladministration by those in charge of management. Fixing of rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and the staff for appointment or nominating the students for admissions were held to be unacceptable restrictions. It was also held that the essence of a private educational institution is the autonomy that the institution must have in its management and the administration and, therefore, there has to be necessarily a difference in administration of a private unaided institution and the Government aided institution. It was also held that for admission into any professional institution, merit must play an important role and such merit is usually determined for admission to professional colleges by either the marks that the students obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution or in the case of professional colleges, by the Government agencies. The above findings were made while discussing the right of a private unaided non-minority educational institution.

37. The rights of private unaided professional colleges were discussed from paras 67 onwards. In para 68 of the judgment, the Apex Court permitted the State Government/Universities who were granting permission or affiliation as

the case may be to require private unaided institutions to admit students for a certain percentage of seats for admission from out of the students who have passed Common Entrance Examination held by itself or by the State/University and who have applied the college concerned for admission while the rest of the seats may be filled on the basis of counselling by the State agency. For better appreciation, para 68 of the judgment is reproduced below:

"It would be unfair to apply the same rules and regulations relating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while at the same time they do not forego or discard the principle of merit. It would therefore, be permissible for the University or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principle may be applied to other non-professional but unaided educational institutions viz., graduation and postgraduation nonprofessional colleges or institutes."

Thus it is clear that the unaided professional colleges are entitled to autonomy in their administration and at the same time they do not forego or discard the principle of merit in admission. The requirement as to merit-based selection and admission can be fulfilled by a common entrance test conducted by the association also. Such test is conducted in respect of certain percentage of seats reserved for admission by the management from out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of the counselling by the State agencies. The above procedure to be adopted for admission is on the principle that the unaided private professional colleges shall be given maximum autonomy.

38. While clarifying T.M.A. Pai Foundation case in Islamic Academy case, Their Lordships formulated four questions for consideration, which I have extracted in the earlier portion of this order. On the question as to whether the minority and non-minority educational institutions stand on the same footing and have the same right, Their Lordships held that the essence of what has been laid in T.M.A. Pai Foundation case is that the minority educational institutions have a guarantee or assurance to administer and establish educational institutions of their choice and the non-minority educational institutions do not have the protection of Article 30 and in certain matters, they cannot and do not stand on similar footings as a minority educational institution. Their Lordships also held that the minority educational institutions have preferential right to admit students of their

community/language and no such right exist so far as the non-minority educational institutions are concerned. While answering the question as to whether the private unaided professional colleges are entitled to fill the seats to the extent of 100% and, if not, to what extent and whether private unaided professional colleges are entitled to admit students by evolving their own method of admission, Their Lordships have held that so far as minority professional colleges are concerned, they can admit in their management quota a student of their community/ language in preference to a student of another community even though that other student is more meritorious. A note of caution was also added that whilst selecting/admitting students, the inter se merit of those students cannot be ignored. It was also directed that even members of their community/language must be strictly on the basis of merit except in the case of their own students it has to be merit inter se those students. Insofar as non-minority professional colleges, the discussion is made in para 16 of the judgment. The said para is again made applicable to both minority and non-minority professional colleges. It is true that admissions could be made strictly on merits from among the candidates who have taken common entrance test. A procedure for admission is also set out. The relevant portion of the said para reads as under:-

"In our view what is necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by the State/University". The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereunder. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test conducted by the State. After holding the common entrance test and declaration of results the merit list will immediately be placed on the notice board of all colleges which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the concerned authority and the Committee. Selection of students must then be strictly on the basis of merit as per that merit list. Of course, as indicated earlier, minority colleges will be entitled to fill up their quota with their own students on the basis of inter se merit amongst those students. The list of students admitted, along with the rank number obtained by the student, the fees collected and all such particulars and details as may be required by the concerned authority or the Committee must be submitted to them forthwith. The question paper and the answer papers must be preserved for such period as the concerned authority or Committee may indicate. If it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in appropriate cases recognition/affiliation may also be withdrawn." (emphasis supplied)

39. So far as the minority institutions are concerned, they are

entitled to fill up the entire percentage of seats allocated to them from among the candidates belonging to the same community, but strictly on the basis of merit according to the marks obtained in the common entrance test conducted by the association or by the State or by the Central agency depending upon the option exercised by the institution. In the event a certain number of seats are not filled, the seats shall be reverted back to the State for being filled from among the meritorious candidates by following Single Window System. So far as the non-minority institutions are concerned, their right of admitting students cannot be equated with that of the minority institutions. The admissions could be made strictly on the basis of merit from among the candidates who have taken the common entrance test. Before the common entrance test is conducted by the association/Consoritum, the individual institute should opt for the mode of admission of students either from common entrance test by association/Consortium or by the State or by the central agency in advance and before the prospectus is issued.

40. This leads us to the next question as to whether the unaided non-minority institution should follow Single Window System of admission. The right of private unaided non-minority professional colleges to establish the educational institution can be so urced to Articles 19(1)(g) and 26(a). The right conferred on them to administer the institution, which includes the admission of students, is on the ground of maximum autonomy. The autonomy is to ensure more such institutions are established, as the State has no funds to establish institution at the same level of excellence as private institutions. By the Single Window System, admissions are made on the basis of merit and by following rule of reservation of the State and the colleges are allotted as per the willingness of the candidates subject to availability of seats and the course. As the association of unaided professional colleges were given liberty to hold common entrance test to select and admit students, as a necessary corollary, the admission of students must be based on the method followed by the association/Consortium. In the event of insistence of Single Window System of admission also for the seats to be filled by the management, the direction for conduct of common entrance test has no meaning. In that case, the entire seats earmarked both to be filled by the State and the management could be filled on the basis of merit and following communal reservation without there being any scope even for the minority institutions to admit the students of their choice from their own community. The allotment of seats must ultimately be based on the option of the candidates. Option is exercised by each of the candidates at the time of counselling and in the same analogy option is exercised by the candidates by applying to the college of their choice and the discipline of their preference. In the event the Single Window System of admission is also insisted, the autonomy in administration of management and admission of students enjoyed by the unaided professional colleges will be frustrated or become meaningless. So long as the merit based admission are ensured and the admissions are made from among the candidates in the order of merit as per the marks obtained in the common entrance test together with the academic marks, the directions in T.M.A. Pai Foundation case for merit-based admission shall be complied with and preserved and in that event insistence of admission by Single Window System is impermissible. By Islamic Academy case, the Permanent Committee is empowered with the power to ensure the merit-based admission and also to take action and in the event

if it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in appropriate cases recognition/affiliation may also be withdrawn. The right of a member of the Consortium to admit the students without reference to the Single Window System is further strengthened while the Apex Court directed that the common entrance test held by the association must be for admission to all colleges of that type in the State. It was also directed that after holding the common entrance test and declaration of results, the merit list will be immediately placed on the notice board of all colleges which has chosen to admit as per the list and the copy of the merit list shall also be forthwith sent to the concerned authority and the Committee. It is also directed that the selection of students must then be strictly on the basis of merit as per that merit list. List of students admitted along with the rank number obtained by the student, the fees collected and such particulars and details as may be required by the concerned authority or the Committee must be submitted to them forthwith. The penal provision for imposing penalty or in appropriate cases withdrawal of recognition/affiliation is only after the above procedures are over and in the event any student is admitted de hors merit. Single Window System of admission is only intended for the seats to be filled on the basis of common entrance test conducted by the State agency. It is only a procedure evolved in exercise of executive power. As long as merit-based admission is ensured as directed in T.M. A. Pai Foundation case and Islamic Academy case, the right of unaided non-minority to admit the students on the basis of common entrance test conducted by Consortium cannot be deprived. In that view, the individual institutes are entitled to admit the students who have applied to it, but strictly on the basis of order of merit. The directions of the Permanent Committee to the Consortium to follow Single Window System of admission in case of non-minority educational professional colleges is beyond the power and contrar y to the law laid by the Apex Court and cannot therefore be sustained.

41. This leads us to the next question as to whether the communal reservation should be followed while admissions are made by the management in the above manner. As the issues are inter-linked with each other, at the risk of reputation it is again mentioned that the right of minority institution is guaranteed under Article 30 and such right cannot be equated to the right of non-minority institution. Insofar as conduct of common entrance test and admission of students on the basis of merit, there appears to be no difference. Insofar as the admission of students by the minority institution, they are entitled to admit students belonging to the same community and in the event any vacancy remains, it shall surrender the seat/seats to the State. No such contingency exists for unaided non-minority professional colleges. Neither in T.M.A. Pai Foundation case nor in Islamic Academy case, it is held that non-minority institution need not follow rule of reservation. The right to reservation has to be judged with reference to the provisions of the Constitution. Laws are enacted under Article 15(4) prescribing certain percentage of seats to be filled for the advancement of socially and educationally backward class citizens or for scheduled caste or scheduled tribes. Such special provisions are notwithstanding the other sub clauses of Article 15 and the clauses of Article 29. Such reservation insofar as the weaker section of people and in particular to scheduled castes and scheduled

tribes is also contemplated in the directive principles under Article 46 of the Constitution of India.

42. Article 15(4) has to be read as an exception to Article 15(1) and Article 29(2). This principle has been enunciated by the Apex Court in "M.R.BALAJI v. STATE OF MYSORE (AIR 1963 SC 649)", "R. CHITRALEKHA v. STATE OF MYSORE (AIR 1964 SC 1823)", "STATE OF A.P. v. P.SAGAR (AIR 1968 SC 1379) and in "D.N.CHANCHALA v. STATE OF MYSORE (AIR 1971 SC 1762)". In "STATE OF A.P. v. BALARAM U.S.V. (AIR 1972 SC 1375)", the Apex Court has held that the Sta te is entitled to reserve a minimum percentage of seats under Article 15(4) notwithstanding Article 2 9(2). On the above backdrop, it is to be now considered as to whether at the guise of the right to establish the educational institutions under Article 19(1)(g) read with Article 26(a), the unaided nonminority educational institution could refuse admission of students by following communal reservation? The right to establish educational institutions under Article 19(1)(g) is only on the basis of the right to carry on "occupation". Education cannot be regarded as either as a trade or business where the profit is the motive. While the State is entitled to regulate the education to ensure maintenance of proper academic standards, atmosphere and infrastructure and also to prevent maladministration, the management is obligated to follow the rule of reservation and that the right of the management under Article 19(1)(g) is subject to reasonable restrictions and r egulations, as the State has enacted law reserving certain percentage of seats for backward, scheduled caste and scheduled tribe candidates under the constitutional mandate. There is another aspect in the matter. After the AICTE Act has come into force, the right of approval to start engineering colleges, number of discipline, total number of intake etc., shall only vest with the AICTE only. The approval is accorded subject to admission of students based on merit as well communal reservation. If a particular institute is allowed to admit 100 students in a particular discipline by the All India Council for Technical Education, by virtue of the direction of the Government 50% seats are filled by the State agency by following Single Window System. The rule of reservation is followed only insofar as these 50 seats are concerned. Insofar as the remaining 50 seats, the State has earmarked the said seats as management quota pursuant to the directions in T.M.A. Pai Foundation case. Hence only the unaided non-minority professional college derives its right to fill the 50 seats from among the candidates in the order of merit on the basis of the common entrance test conducted by the association or Consortium. If the percentage of seats reserved is calculated for 100 seats, it would be less than 50% as the management is entitled to fill up the entire 50 seats and the State agency is entitled to fill up the remaining seats only by following rule of reservation. As the non-minority institutions cannot be placed on par with minority institutions, as their right are guaranteed under Article 30 and no such guarantee is available for non-minority, I am of the considered view that while filling up the seats from among the candidates applying to a particular institution on the basis of merit, each institution shall also follow the rule of reservation of the State while making admissions. Accordingly, point nos.4 and 5 insofar as private unaided professional colleges are answered.

43. Point No.6: Insofar as the submission of Mr.Vijay Narayan, learned counsel for the AICTE as to the requirement of the management also to

follow rule of reservation, the question is answered in point nos.4 and 5. He would argue that pursuant to the directions of the Apex Court in T.M.A. Pai Foundation case, the office memorandum dated 15 .10.2003 issued by the Department of Secondary Education and Higher Education, Ministry of Human Resource Development, Government of India as to the decision that all admissions on all India basis to the undergraduate programmes in engineering etc., in all institutions in the country shall be made through an All India Engineering Entrance Examination (AIEEE). He would submit that subsequent to the above memorandum, the All India Council for Technical Education issued guidelines on 3.11.2003 for common entrance test for admission to degree level engineering for the academic year 2004-2005. He would further submit that as per clause 11, all institutes conducting degree level engineering shall intimate to the authority in the State and the Regional Office of AICTE every year the number of seats that are to be filled on the basis of test conducted by AIEEE. The relevant guideline reads as under:-
"All the Institutions/Universities conducting Degree level Engineering, Architecture/Planning and Pharmacy Programmes shall intimate on or before 30th November, every year to the concerned authority in the State and the Regional Office of AICTE, the number of seats that are to be filled up on the basis of Tests to be conducted by AICEE, State Level Test and Association Test (if any) for the following academic year."

According to the learned counsel, none of the members of the Consortium has intimated the number of seats to be filled up on All India basis and for the test conducted by AIEEE. I am afraid that such arguments could be accepted at this stage. The validity of the impugned order of the Permanent Committee is judged in this order only with reference to the law decided in T.M.A. Pai Foundation case and Islamic Academy case. So long as the above judgments entitle the Association/ Consortium to have a common entrance test to admit the students for management quota and the order of the Permanent Committee in permitting the Consortium to conduct the common entrance test, and in the absence of any challenge to such direction, it is needless for this Court to go into the said question. Nevertheless, from the said guidelines, all that has been directed is that the institutes shall intimate every year to the concerned authority in the State or the Regional Office of AICTE the number of seats that are to be filled up on the basis of test to be conducted by AIEEE, State Level Test and Association test, if any, for the following academic year. The right of exercise of option vests with the institution either to opt for the test to be conducted on All India basis or the State Level or the Association itself. By the said guidelines, it can neither be inferred nor be held that the management must also inform the Regional Office of AICTE or the concerned authority in the State as to the number of seats to be filled up from the other State candidates. It is also relevant to note that the Permanent Committee in exercise of power conferred on it has also directed the conduct of Common Entrance Test at Ernakulam and Vijayawada. It was also brought to my notice that such All India Engineering Entrance Examination is already over for admission for the academic year 2004-2005 and being the transitory period, the AICTE cannot insist that the members of the Consortium should not admit students from other States. In fact students from other States have also been permitted to write the common entrance test conducted by the Tamil Nadu Professional Courses Entrance Examination, as there is no

embargo on any student from other State to take the common entrance test conducted by TNPCEE. There cannot be also any restriction in the case of common entrance test conducted by the Consortium. The conduct of examination on all India basis cannot be equated with the right of an individual candidate to appear for common entrance test in other States. This is more so there is no specific percentage of seats earmarked to be filled on All India Basis as is done in admission to medical courses. I would once again emphasize that I am not considering the validity of guidelines of AICTE, but only the directions of the Permanent Committee on the backdrop of law declared by Apex Court. So far as the guidelines (2) and (6) are concerned, the procedure followed for conduct of CET and the admission based on the merit, I do not find any difference, as they are strictly complied. For all the above reasons, I am unable to accept the submissions of Mr.Vijay Narayan.

44. In fine and subject to the findings in the order, all the writ petitions are disposed of with the following directions:-
(1)The Consortium is not estopped from questioning the power of the Permanent Committee in issuing directions.
(2)The petitioners are entitled to question the impugned proceedings by placing reliance on both the judgments in T.M.A.Pai Foundation and in Islamic Academy cases.
(3)The directions in Clause A(1)(b) and (e) are beyond the power conferred on the Permanent Committee and, accordingly, they are set aside.
(4)The direction contained in Clause A(1)(d) is in accordance with the power conferred on the Permanent Committee by the judgment in Islamic Academy case.
(5)The direction contained in Clause A(1)(n) in directing the Consortium to bear the expenses of the experts is beyond the power of the Permanent Committee and, accordingly, the same is set aside and the State is directed to bear the expenses.
(6)The petitioners are entitled to conduct the common entrance test on 24th and 25th July, 2004 as scheduled and shall publish the results on or before 5th August, 2004.
(7)The unaided minority institutions are entitled to fill 70% of the seats from among the candidates of their community and applied to their institution, but strictly on the basis of merit and the unfilled seat/seats shall be surrendered to the State for being filled by following Single Window System of admission. The unaided minority institutions need not follow the rule of reservation while admitting the students under management quota and to the above extent the direction of the Permanent Committee contained in Clause B(b) is set aside.
(8)The unaided non-minority institutions are entitled to fill 50% of the seats from among the students applied to each of the institutions, but strictly on the basis of merit and to this extent the direction of the Permanent Committee contained in Clause B(c) is set aside.
(9)The unaided non-minority educational institutions shall follow communal rule of reservation while making admissions to the seats earmarked under the management quota and to this extent the direction of the Permanent Committee contained in Clause B(c) is sustained.
(10)The Consortium is entitled to conduct the test and the individual institutions are entitled to fill the seats from the candidates belonging to other States as directed by the Permanent Committee for this academic year.

Consequently, all the connected W.P.M.Ps. are closed. No costs.

Index: yes
Internet: yes

ss/vbs

To

1. The Member-Secretary
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of Common Entrance Test
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2. The Secretary to Government
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